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Legislation and Its Interpretation: A Primer

The importance of legislation and its interpretation to an understanding of law is self-evident; the topic needs, and will receive, no boosting from me. My plan in these lectures is, after a brief introductory discussion of the history of legislation scholarship, to propose a model of the legislative process and then to examine the problems of statutory interpretation in light of this model and other pertinent considerations. My discussion draws on economics, political science, and philosophy. An interdisciplinary perspective surely is necessary to do justice to the topic. I have striven for brevity and simplicity, and, as my subtitle indicates, offer the result as a primer on legislation and statutory interpretation rather than as a treatise. For qualification, elaboration, and documentation, I refer the reader to other sources; and in lieu of footnotes I have added a brief bibliographical appendix in which the works to which I refer, and others important to an understanding of these lectures, are cited. One last prefatory note: although legislation, broadly defined, includes constitutional enactments, I shall try to avoid issues peculiar to constitutions and their interpretation. There is no shortage of discussion of such issues; in contrast, the legal community has rather neglected the equally important issues surrounding legislation and its interpretation.

LEGISLATION SCHOLARSHIP: A BRIEF HISTORY

The history of scholarly discussion of legislative interpretation is actually older than that of the legislative process. The interpretation of decrees has been important for as long as there have been decrees, while the history of legislative bodies that resemble modern legislatures does not begin much before the seventeenth century. Thus we find in Aristotle a prescient discussion of legislative interpretation, but no (other) discussion of the legislative process. Aristotle pointed

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out that legislation is general and that legislators cannot foresee all the particular circumstances to which their handiwork may be applied. Therefore, said Aristotle, judges called on to interpret a statute in a situation not anticipated by the legislators should imagine how the legislators would have addressed the issue had they foreseen it, and interpret the statute accordingly. This method of "imaginative reconstruction" remains influential in modern discussions of legislative interpretation, as we shall see. It is worth noting that Aristotle described his method of interpretation as the method of "equity" (*epieikeia*); imaginative reconstruction would enable judges to avert the injustices that literal interpretation would create.

Medieval jurists discussed the problems of legislative interpretation. A famous instance is the discussion by Italian jurists of a statute of Bologna that forbade the letting of blood in the streets. Did the statute forbid barbers to shave their customers? The problem was the same one that had troubled Aristotle. The legislature had enacted a general statute—one with a broad sweep—without thinking carefully about every instance to which it might apply as a matter of semantics. Maybe, though, they expected the judges to follow the Aristotelian method and in effect amend the statute in the way the legislators would have wanted it amended had they anticipated the possibility that it might be read to forbid shaving. The medieval jurists, not surprisingly, adopted Aristotle's approach.

Let me leave statutory interpretation for a moment and talk about the legislative process. Perhaps the most acute early discussion is in the *Federalist* papers. That discussion is in striking contrast to the naive enthusiasm of Jeremy Bentham—England's preeminent student of the legislative process of the period—for legislation over common-law lawmaking. The experience with legislative supremacy during the American Revolution and the immediate post-revolutionary period had made the framers of our Constitution acutely conscious of the shortcomings of popularly elected legislative bodies, and led them to place limitations on the powers of the House of Representatives—itself the only popularly elected body ordained by the original Constitution. (Both the Senate and the President were to be elected indirectly.) Compare Bentham's advocacy of an all-powerful unicameral legislature—which as a matter of fact is what the House of Commons has become, yet without becoming the fount of utilitarian legislation that Bentham expected a democratic legislature to be.

The limitations on the popular legislature that are found in the Constitution include bicameralism, the veto power, the provision for an independent judiciary, and the prohibitions against laws impairing the obligations of contracts, ex post facto laws, and bills of attainder. The significance of the independent judiciary in reining in (rather than just giving effect to the wishes of) a popular legislature lay in a fact noted by Alexander Hamilton in *Federalist No. 78*—that judges

could be expected to "buffer" unwise laws in application. This disposition, which is closely related to Aristotle's concept of equity in interpretation, was distinct from the power of the judges to invalidate unconstitutional laws. Later we shall see that the independent judiciary may in another respect have aggravated the problems of popular government, by facilitating interest-group legislation. The framers may not have had a lively awareness of this danger. Their main fear was tyranny of the majority rather than of a minority, yet it is the latter sort of tyranny that is the greater danger in an interest group society, such as the United States has become.

Legislative interpretation in the nineteenth century was dominated in both England and America by two strains of thinking. One, which was much the stronger, expressed its deep distrust of legislation in the interpretive principle (the embodiment of Hamilton's principle of the buffering function of judicial interpretation) that statutes in derogation of the common law were to be narrowly construed. By this means, legislative efforts to make new law, especially of a redistributive character, were blunted; the rationalization was that the common law expressed principle, and legislation merely expediency, or "politics." The other influential strain of thinking, the hermeneutic, emphasized the problematic character of textual interpretation. The major figure here is Francis Lieber, and it is no accident that he was German-born. Lieber brought to the United States news of German research in the problematics of interpretation, and he applied the new hermeneutic learning to legislation in an influential work (*Legal and Political Hermeneutics*, first published in 1839) that continues to be cited. The lesson he drew was the necessity of flexible interpretation.

The turn of the century (really twenty years on either side) saw a change in intellectual opinion about legislation. The distrust of legislation and the veneration of common law were criticized as manifestations of political conservatism. Legislation was seen as a progressive force. This was true even in the case of scholars such as the political scientist Arthur Bentley who saw clearly that legislatures were arenas in which interest groups struggled for power, rather than simple conduits for the popular will. These scholars believed that the competition of interest groups manifested a wholesome American pluralism, and that legislative compromises among them would create a social optimum that judges should not try to thwart. Indeed, for Oliver Wendell Holmes the competition for legislative power was just another scene of the struggle for survival; in this perspective, the hostility to legislation of the advocates of laissez-faire reflected too limited an understanding of Social Darwinism. But for the most part it was political liberals who opposed the interpretive doctrines that had been designed to limit the scope of legislation.

Out of this period of reconsideration came, as one might expect, an optimistic conception, much in the spirit of Lieber, of the possibility of

statutory interpretation that would be at once generous and objective. If judges would only read legislation carefully, sensitively, with a disposition to help rather than hinder the legislative thrust—to complete rather than thwart the enterprise set on foot by the legislation—they would be able to bring about a result both “intended” by the legislature in a meaningful but not confining sense and good in its own right as expressing and fostering the social optimum to which legislation in a democratic society could be expected to conduce. Here was a revival of the Aristotelian and medieval tradition of imaginative reconstruction as well as a bow in the direction of hermeneutic liberals such as Lieber. The great names here are Landis, Frankfurter, Hand, and Hart and Sacks.

The consensus that this school of thought had forged by the end of the 1950s now lies in ruins. Contributing to its destruction has been an economic school of thought which argues, against the older political science literature, that the competition of interest groups often, perhaps typically, leads to misallocations of resources and arbitrary redistributions of wealth. Some versions of the economic assault on optimistic pluralism actually advocate a return to the canon against statutory interpretations in derogation of the common law—perhaps in strengthened form. Closely related is the social-choice movement, which has shown that voting procedures in general and “representative” government in particular can be perverse methods of registering preferences. There is also a hermeneutic school of thought—the epigones of Lieber and his Continental confrères—linked in some versions to radical political thought and in others to epistemology and to literary theory, that expresses profound skepticism about the possibility of objective interpretations of any texts, including legislative ones.

Legislation scholarship has become cacophonous. I admit to having contributed to the noise. In a series of articles written mainly in the 1970s I pushed the economic interest-group line hard, and educed a number of implications, largely skeptical, for legislative interpretation. More recently I proposed renewed reliance on the method of imaginative reconstruction; more recently still, I suggested a command theory of interpretation; *still* more recently—and the line I shall take in these lectures—a pragmatic approach. I continue to believe that the economic approach to legislation has great utility but I have always considered it incomplete and I disagree with those who have pushed it further than I have.

A MODEL OF THE LEGISLATURE

The basic assumption I make in modeling the legislative process is that everyone involved in it, from the voter to the legislator, is rational, in the sense of acting consistently to promote his goals and responding to incentives in the pursuit of them. This is not to assume,

however, either that everyone is well informed or that everyone is selfish. There is such a thing as rational ignorance—the costs of obtaining information may exceed the benefits—and there is also altruism, although in our society, at least, and probably in most human societies, altruism is rarely a strong, durable force outside the family.

It will help in understanding representative government to note the disabling problems of its democratic alternative—direct (“participatory,” “town meeting”) democracy—in other than the smallest groups. Two problems are fundamental. One is the costs of transacting—that is, of reaching agreement—which rise exponentially with the number of parties to the transaction when every party must agree (the importance of the qualification will become clear in a moment). The other is the costs of information, which rapidly become prohibitive if everyone is expected to be well informed about all major policy questions. It might appear that the first problem could easily be solved by substituting majority vote for consensus as the method of making decisions. Then no member of the polity would have an incentive to hold out in the hope of coercing agreement with his particular policy preferences. Indeed, no member would have to be consulted; voting enables decisionmaking without deliberation. The problem with majority rule is that it may lead to a tyranny of the majority. Two different aspects of that tyranny should be noted. The first is the exploitive: what is to prevent the majority from using its power to transfer wealth and power from the minority to itself? Second, voting does not register intensity of preferences. A majority of voters tepidly inclined toward a policy intensely distasteful to a minority has the power in a system of majority voting to enact that policy into law. Yet net social welfare, as measured say by utility in Bentham’s sense, may fall, since the aggregate disutility to the minority may exceed the aggregate utility to the majority. The tyranny of the majority can be reduced by giving constitutional rights to members of minority groups—in other words by reducing the scope within which the majority is permitted to translate its preferences into law—or by making the electoral process more responsive to intensity of preference. The latter is perhaps done automatically in any system (for example, the California referendum) in which expensive campaigns are waged pro and con policy proposals made to the electorate.

The problem of information costs is left untouched by these suggestions, however, and is so acute as to have made representative government the standard system of democratic governance in all but the tiniest polities, although there are pockets of direct democracy, illustrated by the frequent referenda in Switzerland and in California, even in substantial polities. In a system of representative government the voter votes for a representative rather than for individual policies, so all he has to inform himself about is the competence and general policy orientation of the candidates, as well as about the candidates’

particular policy preferences that may be of transcendent importance to him. The representative specializes in the acquisition of information about public policy, and becomes more specialized the longer his tenure and the greater the internal division of labor in the legislature (e.g., through a committee system). Other citizens have time to attend to nonpolitical affairs.

The representative system is no panacea. The electorate in such a system has even less incentive to be well informed about policy than it would have in a system of direct democracy, because the benefits of being well informed about a given policy are smaller when one is voting for a representative than when one is voting for the policy itself. The representative represents persons with different preferences (no majority coalition is entirely homogeneous), so there can be no assurance in voting for a representative that if elected he will support the voter's preferred constellation of policies; indeed the representative is quite unlikely to support all of them. And this is apart from the fact that the representative may turn out to be an unfaithful representative—a possibility, to be discussed shortly under the rubric of agency costs, of which a rational voter should be aware.

The package-of-policies character of voting for a representative, combined with the possibility that the representative will not honor his campaign promises, is a deterrent to becoming a well-informed voter—even a deterrent to voting at all, and in fact a large percentage of eligible voters do not vote. Reinforcing the tendency not to vote, or at least not to invest time and effort in becoming a well-informed voter, is the fact that, as soon as the electorate for a particular office exceeds a few thousand, the probability that a single vote will determine the election's outcome becomes negligible. As a result, there is little benefit to voting other than as consumption or (what is analytically very similar) fulfillment of civic duty. There is correspondingly little incentive to become well informed, even along the limited dimensions that are all that is required when one is voting for representatives rather than for a full menu of public policies.

Moving from a system of direct democracy to one of representative democracy does not eliminate the problem of the tyranny of the majority, but it does foster the emergence of devices for mitigating the problem (such as bicameralism) even if one doubts, as inconsistent with my model as well as with much experience of politics, the possibility of imbuing our representatives with a strong sense of civic virtue. The most important device is an unintended byproduct of a representative system. We have seen that in such a system the electorate's incentive to become well informed about specific governmental policies is notably weak; this creates a space within which a representative can cater to minorities. These, it goes without saying, need not be worthy or oppressed minorities. They may simply be interest groups peculiarly able to mobilize resources in support of favored can-

didates. A representative system entails competition for office, and money is important in that competition. The same things that disincline the average voter to invest much time in learning about candidates disincline him to contribute money to candidates: his contribution will have little effect on the outcome of the election and anyway he may not have a clear idea of which outcome would make him better off. A compact group, each member of which has a significant stake in the election, can overcome this disinclination and hence make significant campaign contributions, whether in the form of money or of campaign workers. The *quid pro quo* is the candidate's implicit promise to support, or at least not vigorously oppose, the policy around which the group has formed. Provided the costs of the policy are diffuse—that is, are not concentrated on an interest group that could mobilize effective opposition through its own commitment of resources to the election campaign—the candidate may find it in his self-interest to support the policy even if it disserves a majority of his constituents as well as society as a whole. This implies, to be sure, that representatives frequently are unfaithful agents; but that should come as no surprise. We expect in a model of rational behavior that agents will tend to be unfaithful—that is, to pursue their own goals—when control by the agents' principals is weak, and it is weak when the principals are thousands or millions of voters many of whom have little perceived stake in, or knowledge of the merits or consequences of, most of the policies their agent supports. Paradoxically, the essential mechanism of control in the political arena—periodic election—drives a wedge between agent and principal. It gives the representative a strong incentive to support policies promoted by interest groups that can contribute disproportionately to his campaign, even if those policies harm his constituency as a whole.

As government becomes more versatile and effective in the use of its powers to redistribute wealth—and as the amount of redistributable wealth grows—we can expect the role of interest groups in the legislative process to grow, and so we observe. So let us take a closer look at the interest-group phenomenon. It is, as I have intimated, distinct from James Madison's concept of factionalism. Madison was concerned primarily with the capture of the legislative process by a passionate though probably temporary majority (his sense of "faction"). The interest-group state that we inhabit, in contrast, involves rule by (more precisely, disproportionate influence by) coalitions of minorities—including pharmacists, parents of American medical students in foreign medical schools, building contractors and members of building trades, automobile manufacturers and their workers, high-sulphur-coal producers, dairy and tobacco farmers, railroad workers, defense contractors, tort plaintiffs' lawyers, public school teachers and administrators, shipowners and maritime workers, owners of television stations, some tenants, and some borrowers.

Interest-group legislation is most likely to be pushed through if (1) the members of the group will derive a substantial per capita benefit from the legislation and (2) the costs will be widely diffused, and therefore low on a per capita basis. The smaller the group, the likelier these conditions are to be satisfied. The reason is that in a small group the benefits to each member may be great yet the aggregate amount of the transfer required to confer the benefits small and therefore easily spread over a large public, each member of which will experience a small, perhaps imperceptible, reduction in welfare. However, if the group seeking benefits is *too* small, the aggregate benefits may not be sufficient to defray the cost of making substantial campaign contributions, and the voting strength of the group may be slight as well. Then politicians will have little incentive to strike a deal with the group. The geographic distribution of the group's members is also relevant. At the federal level the optimum distribution is concentration in a large number of small states; that will maximize the group's influence in the Senate, where small states are overrepresented on a per capita basis.

It would be a mistake to suppose that interest groups are wholly a bad thing; there is a grain of truth to the optimistic pluralism of the Bentley-Truman school. Benefits per capita and costs per capita are proxies, albeit very crude ones, for intensity of preference and of aversion, and so admitting them to the political process helps to overcome the utilitarian objections to majority rule. But it does not assure that welfare will be maximized—far from it. As an approximation to a free market, the “market” for legislation is exceedingly crude. The aggregate benefits of an interest-group statute may be very slight, and the aggregate costs enormous but so well diffused that formation of an effective opposition is infeasible.

It would also be a mistake to suppose that all legislation is of the narrow interest-group variety. Apart from cases where a narrow group's interest happens to coincide with the broader public interest, there are cases where the benefits of legislation, though widely diffused, are very great and the costs of the legislation are either slight or, if substantial, widely diffused; and here we would expect legislation to be enacted even if it did not interest a narrow group. The national defense, the criminal justice system, the antitrust laws, some environmental laws, and the courts are examples of what appear to be genuine “public goods” rather than mere redistributions of wealth in favor of special-interest groups.

This is not to deny that interest groups frequently shape such legislation even if the public at large rough hews it (to borrow a distinction made by Hamlet). Certainly the national defense has been profoundly affected (mostly for the worse) by interest groups of officers, veterans, and above all defense contractors and their employees; and the environmental area provides many parallel illustrations. Moreover, the

term "public goods" is ambiguous. In a loose sense it denotes goods that are provided for a public rather than a narrowly selfish or private purpose, but to an economist it means goods (or services) that confer benefits on others besides their purchasers and are therefore goods that private markets find it difficult to supply in optimum quantities. National defense and the other examples I just gave of "public goods" are public goods in the economic sense, and legislation to provide them is the kind of legislation that is supported (in principle) even by believers in minimum government—the "nightwatchman" or "laissez-faire" state of classical liberal (in its nineteenth-century sense) thought. But when public goods are thus defined in the economic manner it becomes apparent that interest-group and public-good legislation do not exhaust the possible types of legislative enactment. There is in addition legislation seemingly actuated by widely held concepts of distributive justice—certain welfare-benefit programs and the laws against discrimination may be of this character. There is also legislation welling out of deep though obscure public sentiment, frequently paternalistic in character; the laws against obscenity are a good example. And there is legislation that reflects popular ignorance and prejudice; many observers would include the laws against marijuana and against sodomy in this category. The three types of legislation I have just described may or may not confer substantial benefits, but they do not appear to be part of the essential furniture of the economist's minimum state.

As with public-good legislation, these other sorts of legislation may be deformed by interest-group pressures. But they are not *merely* redistributive legislation in favor of a group with political power but no ethical claim.

The achievement of any legislative goal—to redistribute wealth to an interest group, to create a public good, to do justice, to protect the public from obscure dangers, to pander to popular fear and credulity—is fraught with obstacles. Some of these inhere in the nature of legislation, some in the particular structure of our government. The foremost obstacle, the one emphasized by Aristotle, is the limitedness of human foresight. Legislation is general in scope and (for reasons to be examined shortly) indefinite in duration, which means that the legislators can have only an imperfect understanding of the range of factual situations to which a statute they enact may someday be thought to apply. The problem of limited foresight is aggravated by the fact that most legislators have a very limited time horizon—the next election. This reduces their incentive to invest time and effort in crafting far-sighted legislation. Clearly then, the legislators need "agents in application," who are, of course, the judges. However, judges in our system—especially federal judges—have considerable independence from the legislature. This makes them imperfect agents. Indeed, as I have noted, some of the framers of the Constitution hoped and ex-

pected that the unprecedentedly independent judiciary they were authorizing would exercise discretion in interpretation in order to civilize the product of the legislative branch with its populist component (the House of Representatives). So the judiciary cannot be the complete answer to the problem of limited legislative foresight.

Courts have interpretive discretion—in some cases, a completely free hand—not only because of inherent limitations of legislative foresight and the judges' imperfect agency, but also because the proponents of legislation will often, in order to pull the wool over the eyes of actual or present opponents, misstate the actual goal of the legislation. The courts can then fasten on the ostensible goal and use that to guide interpretation. And often they *must* do this, simply because the true goals and lines of compromise may not be a part of any public record, or for that matter of any private record accessible to the courts.

Then there is a serious gatekeeping problem in legislatures that makes legislative enactment an arduous, protracted task. The legislative agenda is limited, in part because the costs of transacting (even with majority rule) are high in a large legislature, such as the U.S. Congress. In addition, the outcome of a voting procedure for making decisions may be highly sensitive to the order in which issues are presented for a vote, and for this and other reasons voting procedures would often fail to reflect majority preferences even if the procedure were used by a legislative body consisting entirely of faithful representatives of the people.

The obstacles to legislation, including legislation that truly reflects the preferences of the legislators or their constituents, are by no means entirely a bad thing. For those who believe that that government governs best which governs least, it is a relief that legislatures have such a hard time passing laws. In addition, legislating includes the repeal of existing legislation as well as the enactment of new legislation, and so if legislation were easy to enact this would imply that it was easy to repeal, and the result might be undue instability in public policy. Then too there is no magic in the preferences of legislators, given their imperfect agency, or of the electorate, given voters' lack of strong incentives to become well informed on issues of public policy or even on the qualifications of candidates. In light of these considerations the fact that the impediments to legislative enactment and repeal give the courts a big role to play in the shaping of legislative policy may actually improve the quality of our public policy. The most important point, however, is that that role is inevitably a large one. Here is another reason for this conclusion: The high transaction costs of legislating can be reduced by making legislation as general as possible, because generality both enables differences to be papered over and reduces the frequency with which legislation must be amended in order to prevent it from becoming obsolete. And generality is always

an option for a legislature, which unlike a court cannot be forced to decide specific issues. But the effect of generality, both directly and through its indirect effect of increasing the durability of legislation, is to delegate more and more of the actual legislative power to the interpretive body, which is to say the judiciary.

The relation between judicial independence and legislative efficacy is thus a complicated one. On the one hand, the more independent the judiciary, the less faithful an agent of the legislature it is likely to be. On the other hand, the more independent the judiciary, the likelier it is to be a competent interpreter, simply because an independent judiciary will provide a more attractive career to persons with highly developed legal analytic or public policy skills than one that is the legislature's handmaiden. Also, an independent judiciary is more likely than a dependent one to interpret legislation according to the tenor of its original enactment rather than according to the preferences of current legislators, since the latter have no direct control over the judge. And interpretation according to the original tenor of an enactment, where this is feasible (it isn't always, as we are about to see), imparts greater durability to the original "deal" that launched the legislation on the world. So, paradoxically, an independent judiciary may foster interest-group legislating at the same time that it undermines it by being free to disregard the political pressures that play on legislators.

INTERPRETATION

The discussion of the legislative process in the preceding part of these lectures both shows that courts are an essential part of the legislative process functionally viewed and provides essential background for evaluating competing approaches to statutory interpretation and developing a better approach. Among traditional—yet still widely employed—approaches to statutory interpretation, three predominate. I shall call them the *formulaic*, the *mentalist*, and the *purposive*. The first claims that correct interpretation is a matter simply of following rules of interpretation—the "canons of construction." Among the canons are the following: remedial statutes should be broadly construed, penal statutes narrowly; statutes should be interpreted so as to avoid constitutional questions; statutes creating rights against the sovereign should be narrowly construed; later statutes shall be presumed not to repeal earlier ones unless there is a "plain repugnancy" between the old and the new—in other words, implicit repeals are disfavored; *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another—in other words, explicit exceptions are deemed exclusive); *eiusdem generis* (a statutory enumeration of examples of the statute's application creates a presumption that any other applications must be similar to the examples); statutes in derogation of the

common law should be narrowly construed—as should be statutes adversely affecting American Indians; if the meaning of a statute is plain, resort to extrinsic aids to construction, such as legislative history, should be avoided; a statute should be interpreted in such a way that none of its language is redundant. And so on.

There is no objection in principle to rules of interpretation, any more than to other rules. Rules can make law simpler, more predictable, more even-handed. The objection to the canons of construction is that they constitute an unsound and unworkable system of rules.

Three types of canons can be distinguished. The first consists of rules for reading texts in general. Let me call these *reading* canons. Some of these canons seem wrong, such as the plain-meaning canon, which seems to imply that the way to read a text is first acontextually, and only if this reading produces puzzlement to consider its context. This is not the way people do or should read, and here it should be noted that the parallel approach in contract interpretation, which forbids inquiry into context if the words of the contract are plain, is largely discredited. Equally dubious is the nonsurplusage canon, which overlooks the fact that redundant language is frequently included in a document for emphasis, or because of inadvertence. But the main objection to the reading canons is not that some of them are wrong—for others, best illustrated perhaps by the ever-popular *expressio unius est exclusio alterius*, are not wrong, or at least not always wrong—but that they are unnecessary. Judges after all know how to read. The canons to the extent valid are generalizations about competent reading. The competent do not need them, any more than they need a handbook on English grammar. The incompetent are unlikely to be able to apply them.

The second type of canon I shall call a *legislative-policy* canon. Its purpose is to help the court interpret the statute in such a way as will promote the legislature's goals. Perhaps the clearest example is the canon that remedial statutes should be construed broadly. The idea is that the legislature would have *wanted* such a construction, in order more perfectly to achieve the object of the statute. This and other legislative-policy canons are easily criticized, especially when one has been sensitized by the interest-group theory of legislation to some of the realities of the legislative process. A so-called remedial statute may after all be a compromise, and construing it broadly may wreck the compromise by giving the supporters of the statute a better deal than they were able to wrest from the legislature. To take another example, the canon against implied repeals rests on the assumption that the legislature would not want its earlier work casually undone—but why should we think that legislators care much about preserving their predecessors' handiwork? And so with the canon that statutes in derogation of sovereign immunity should be construed narrowly. Do legislators *really* care whether persons harmed by governmental activ-

ity have slightly greater or slightly lesser claims on the Treasury? It is not the legislators' pockets that will be emptied to pay these claims.

The third type of canon, which is emphasized in Cass Sunstein's forthcoming book, *After the Rights Revolution*, I call *extrinsic*. It expresses the policy preferences not of the legislators but of the judges. The most famous example is the canon, now pretty well discredited, against interpretations that infringe common-law rights. This canon expressed the aversion of English and American judges to the nascent social-welfare legislation of the late nineteenth and early twentieth centuries. A good modern example is the canon against statutory interpretations that raise constitutional questions, even though the questions might be resolved in favor of the validity of the legislation. There is no reason to suppose that legislators want the scope of their statutes cut down merely to avoid creating a constitutional question that, if answered, would leave the statute valid and intact. But it is easy to see why the courts prefer not to deal with constitutional questions—questions that often are not only difficult but also politically controversial—if they can possibly avoid it. And so with the canon against trenching on the interests of American Indians. Most judges are sympathetic to the Indians, who not only were brutally treated in the nineteenth century but even today have trouble entering the mainstream of American life; and the canon is the expression of that sympathy. Now, this is fine—despite all the cant about the law's impersonality and objectivity, judicial sympathies and aversions are bound to affect statutory interpretation. But it is rather inconsistent with the pretension of the formulaic method to be able to reduce statutory interpretation to a science; nor does Professor Sunstein, at least, have any such aspiration.

Even if all the canons were demonstrably sound, they would not add up to a satisfactory system of rules, for they are often (though not always, as Llewellyn once suggested) in conflict. (This is why the systemic advantages of rules, which I mentioned earlier, do not make the case for the canons.) The plain-meaning rule may pull one way in a case, the canon favoring the Indians in another. No one has suggested a satisfactory way of ordering the canons so that conflicts would be prevented. But if they are not satisfactory as a set of rules, maybe they (those that are not wrong) can be rehabilitated as presumptions. I doubt, however, whether there is a practical difference between this approach and a frank acknowledgment that the canons are at best a checklist of relevant considerations for a judge to consult before making up his mind about the meaning of a statute. Of course he should read the text carefully, of course he should consider how he can carry out the legislators' goals, but of course he should consider other things as well, such as the sensible judicial aversion to unnecessary constitutional lawmaking and his own ethical intuitions and policy preferences. All this is fine but it is hardly formulaic, and perhaps it is a

little too intuitive, too obvious, to be a helpful systematization of interpretive methodology.

The *mentalist* approach sees the task of statutory interpretation as one of establishing a path between the intentions of the legislators and the understanding of the judges. It exemplifies a rather archaic epistemology in which human communication is conceived of as the sender's encoding an idea in language and the recipient's decoding it in order to recreate the idea in his own mind. The mentalist approach and the epistemology that it reflects have been subjected to withering criticisms from the hermeneutics school and others, but sometimes the criticisms go too far and become ridiculous. It is a fact that Dean Perlman conceived the idea of my coming to Lincoln, Nebraska, on November 10, 1988, to give two lectures, that he encoded that idea in language in a letter to me to which I replied agreeing to come, and that, lo and behold, on November 10, there I was in Lincoln prepared to give the lectures. Statutory interpretation often operates in a similar fashion, notwithstanding the fact that there is no legislative "mind" as such, there are just the separate minds of the legislators. Often a judge will read the words of the statute and understand that the draftsmen and the legislators who voted for it had something rather particular "in mind" so far as the present case is concerned. The statute might say for example that no suit on a written contract may be brought more than ten years after the contract was signed, and the plaintiff has filed suit eleven years after signing the contract sued on, and has offered no justification or excuse for the delay. We could not say that the legislators had this plaintiff "in mind," but they had the class of litigants to which this plaintiff belongs "in mind" in a perfectly intelligible sense.

Unfortunately for those who like their law cut and dried, this method, what I am calling the "mentalist" method, will not work in difficult cases. It is at best the method descriptive of how interpretation works in easy cases. The difficult cases are the ones in which (unlike my previous example) the class of case that has arisen was not foreseen, or the litigant makes arguments that might have moved the legislators had they been made to them—but they were not made. These are two different contingencies, not one. The first makes the method unworkable, but the second makes it problematic—for we may know what the legislators had "in mind" but doubt whether they would have kept it there if they had been apprised of the considerations that the litigant resisting the mentalist interpretation is advancing. To take a well-known example, the legislature may have tied eligibility for jury duty to voting eligibility at a time when women were not entitled to vote, and may have had "in mind" that of course women should not serve on juries. What happens when women gain the vote? Should we use the mentalist approach to conclude that (constitutional objections to one side) the statute does not authorize wo-

men to serve on juries—the reference to voting eligibility is not to the current rules of voting eligibility but to the rules that were in force when the statute was enacted? What would we be achieving by such an approach?

A natural alternative to the mentalist approach is the *purposive*, which is to say the method of imaginative reconstruction, discussed earlier. Here the idea is to discover not what the legislators *did* think about the interpretive question that has arisen, but what they *would have* thought if the question had been presented to them. The application of the approach requires not a foray into mental excavation, but a grasp of the purpose of the statute, or, alternatively, of the problem that the legislators were trying to solve. Like the mentalist approach, the purposive approach often works perfectly well, but there is a nagging residue of cases in which it doesn't work at all. These cases are of three kinds. In the first, the true purpose of the statute cannot be recovered by the court, because the purpose was to effect an unprincipled transfer of wealth and was not disclosed publicly. In the second class of cases, which is related to the first, the statute was a product of compromise, and a purposive interpretation would upset the compromise. For a compromise is not itself "purposive" in a helpful sense of the word; it is the point of collision between opposed purposes. In the third class of cases, the values of the legislators are not modern values and the question becomes whether, in deciding how the legislators would have responded if the interpretive question that has arisen today had arisen then, we should assume that they were given not only the question we want answered but all the knowledge and experience that have accreted since the statute was passed and have given us our different values. So, for example, in interpreting the Sherman Act, should we ask how the Senators and Representatives of 1890 would have answered the interpretive question knowing what they knew, or how they would have answered it if they knew what we know? The former answer is unsatisfactory because it throws away everything we have learned in a century of academic study and practical experience with problems of competition and monopoly—and in doing this it attributes to the framers of the statute an implausible desire to prevent learning by experience. However, the latter answer is unsatisfactory too, because it requires an exceedingly difficult counterfactual inquiry and in practice is likely to be a mask for decision according to contemporary policy preferences rather than according to anything that can be described with a straight face as the preferences or policies or values or understanding or purposes of the people who enacted the statute.

I have said that the mentalist and the purposive methods work well with easy cases. But it might be more accurate to say, as I did when discussing the "reading canons," that for easy cases judges don't

need interpretive methods; interpretation is easy, unself-conscious, and unproblematic in such cases.

In difficult cases the traditional approaches do not work well; do the newer ones? I begin with Hart and Sacks's restatement of the purposive approach, in their classic, *The Legal Process*. Reflecting the sunny pluralism (some would say the complacency) of the 1950s, Hart and Sacks urged judges to interpret statutes purposively, and in doing so—and this was the novelty of their approach—to assume that legislators were reasonable people reasonably attempting to achieve reasonable results. Since judges are also reasonable people—or at least think they are reasonable people—this amounted to telling the judges to interpret a statute so as to make it the best statute that it could be. This is not to say that the judges were to ignore text and legislative history; for these, being the product of presumptively reasonable and knowledgeable men, would be important sources of information about how the statute could be perfected in interpretation. Moreover, Hart and Sacks were great believers in comparative advantage and therefore advised courts to defer to legislatures in areas of superior legislative competence. But the important point is that in Hart and Sacks's account the judges and the legislators are standing side by side, shoulder to wheel. For provided that the judges and the legislators share common values—the tacit assumption of Hart and Sacks, and a more plausible one in a consensus era such as the 1950s than it would be today—they are engaged in a cooperative enterprise and there is little danger therefore that a careful and experienced judge will step on the legislators' toes. Indeed, carried to its logical extreme, the Hart and Sacks approach implies that the judge can imagine himself the legislator's alter ego, and rule accordingly.

This is a *highly* optimistic approach to the problem of statutory interpretation, reminiscent of Aristotle's; Aristotle can hardly have had a sense of tension between the legislative and adjudicative functions, which were not sharply distinguished in the Athenian legal system of the fourth century B.C. The immediate antecedent of Hart and Sacks's approach, however, is not Aristotle but the New Deal revolt against the Anglo-American judge's traditional distrust of legislation and popular government generally. The sunny optimism of the New Dealers about legislation underlies Guido Calabresi's recent resurrection of the James Landis and Hart-Sacks partnership approaches to statutory interpretation.

At about the same time that Hart and Sacks were writing, a new pessimism about the legislative process was aborning. The modern interest-group theory of legislation, sketched earlier in these lectures, dates from that time. It offers a powerful critique of the Hart and Sacks approach. In place of a vision of legislators and judges striving in unison to maximize the public welfare, the interest-group theory offers a picture of unedifying dealmaking between interest groups and

legislators. This picture makes the judicial role problematic in two respects. It raises the question *why* judges should conceive their function as one of faithful, even enthusiastic, advancement of legislative policy. And it makes interpretation seem less feasible, by teaching that the true purposes of statutes often diverge from their ostensible purposes and by emphasizing that many statutes are the product of compromise, which makes the discernment of purpose especially difficult—perhaps impossible. The interest-group theory is particularly damaging, I think, to the formulaic method of interpretation. It deals body blows to important canons of construction such as the canon that remedial statutes should be construed broadly; it undermines such aids to interpretation as post-enactment legislative history, by warning that such history may be the effort of losers in the legislative struggle to redeem their loss in the courts; and it casts grave doubts on judicial efforts to repair defective statutes (as by implying private rights of action in regulatory statutes that lack strong remedies), by warning that the absence of strong remedies may have been a component of the deal that enabled the statute to command majority support. These canons can be rehabilitated only by adopting an outright “political” stance toward legislation: essentially one of hostility toward legislation that does not advance the observer’s concept of sound public policy.

The interest-group theory of legislation that has resulted from reflection on the problems of statutory interpretation in the light of contemporary understanding of the importance of interest groups in the legislative process has proved to be a road with three forks. One leads toward narrow interpretation of statutes in general; that is the way of Frank Easterbrook, who has marshaled in support of this approach a host of skeptical teachings drawn from social-choice theory and political theory (with a dash of epistemology tossed into the brew) as well as from the interest-group theory proper. A second fork leads toward efforts to identify, and construe narrowly, those statutes that in fact embody interest-group deals. That is the way of Jonathan Macey. The third fork leads to the conclusion that the judicial task is *basically* unchanged by recognition that many statutes embody the unprincipled deals of special interests. If nothing else, it is not a *realistic* aspiration of judges to try to change the basic character of democratic politics. (Easterbrook appears to believe that it is an undesirable as well as an unrealistic aspiration; Macey that it is both a desirable and a realistic one.) On this view, the only significance of the interest-group theory for judges is that it should make them aware of the pitfalls in the conventional interpretive approaches; they should be cautious about post-enactment legislative history, alert for signs of compromise, etc. On this view, therefore, the interest-group theory has only marginal implications for statutory interpretation. Marginal, but not

trivial; for it is an ingredient in the distinctive approach to statutory interpretation that is sketched next.

The approach has four distinctive elements, though it is also comfortable with the elements of certain older approaches. The first distinctive element, just mentioned, might be called the *interest-group theory contained or domesticated*. The importance of interest groups is recognized, but interest-group legislation is neither celebrated nor deprecated. The second element is the *command analogy*; the third is the *end to interpretation*; the fourth, which is closely related to the third and which provides the capstone of the approach, is *pragmatism*.

By the command analogy I mean simply that it is helpful to think of statutes on the analogy of commands, as of military superiors to their subordinates. The point is not, as some critics have thought, to enjoin mindless obedience on judges, but actually the opposite—to emphasize the freedom of judges by noting that, even in so hierarchical an enterprise as the military, subordinates frequently are called on to exercise initiative. The superior officer's command may have become garbled in transmission or may fail to correspond to conditions on the ground, yet the subordinate still must act, in a way that will best carry out the common enterprise—and this whether or not he shares the precise values of his superior. The position of judges vis-à-vis legislators is much the same. Often the legislative command is inscrutable, yet the judge must decide the case, so he does the best he can to advance the common enterprise—which is not the furtherance of specific policies that he may not share with his masters but the peaceable governance of the United States.

The command analogy may provide useful orientation concerning the nature of the interpretive task in difficult cases, but it will not decide specific such cases. Nor indeed will reflection on the meaning of "interpretation." Some bold spirits have in recent years advanced the view that interpretation, particularly of the Constitution but implicitly of statutes as well, need not, perhaps cannot be, interpretive; that we have an "unwritten" Constitution; that common law and statute law are really the same thing. The entire iconoclastic enterprise appears to rest on the fallacy of supposing that "interpretation" describes a particular methodology that is applicable to some texts but, as it happens, not to constitutions or statutes. In fact interpretation is a portmanteau word so capacious that virtually nothing that a court might "do" to or with a statute could not be thought interpretation in a semantically permissible, indeed orthodox, sense. What these critics of "interpretivism" should be understood as saying is that the interpretation of legislation is often more like completion than translation—more like improvising the cadenza to a Mozart piano concerto or the accompaniment to a Gershwin tune than like translating a Mercedes owner's manual from German into English. The legislators impart the initial thrust, but the judges determine the direction of the jour-

ney. We started with a text, the Constitution (as later amended); but the body of constitutional law that the judges have built on the text's foundation is remote from it. And so with the Sherman Act and modern antitrust law.

The rejection of interpretation, as a concept unhelpful in deciding particular questions of statutory application and certainly not constraining—and therefore a figleaf concealing judicial creativity—leads naturally to a pragmatist approach to statutory questions; pragmatism reduces questions of meaning to questions of consequence. Pragmatist interpretation asks, therefore, what are the consequences of the alternative readings of the statutory provision in question? Which one is, all things considered—notably including all things that lawyers are sensitized by their craft to consider pertinent—the best? Take that familiar chestnut, does the provision in the Constitution that requires the President to be at least thirty-five years old *really* mean what it says, or should it be understood loosely, as disqualifying the immature? It *looks* clear enough, but that is true of a number of constitutional and statutory provisions that have been interpreted contrary to their apparent meaning. The eleventh amendment forbids states to be sued in federal court without their consent in diversity suits, but has been interpreted to encompass most non-diversity suits as well. Section 1 of the Sherman Act outlaws contracts that restrain trade, but the judges have glossed this as if the word “unreasonably” appeared before restraint of trade. The examples are endless; why not make the age-thirty-five provision one of them? One answer is that for a court to change a *number* in a statute makes judicial creativity too obvious, too provocative; and that is not a bad answer, even though it is at root political. But the best answer, I think, is that little would be gained by judicial rewriting of this particular provision—experience teaches that the field of selection for the Presidency is not unduly curtailed by a rigid age-thirty-five requirement—and much in the way of clarity would be lost, since it would be unclear in advance of the election whether a candidate who was under thirty-five was actually eligible for the office.

In the pragmatic approach, the canons of construction—those that are not outright mistaken—figure as considerations, though considerations rarely necessary to mention, appearing on an open-ended list of the considerations relevant to an assessment of consequences. The relevant consequences include not only the consequences for the persons or interests affected by the particular provision being “interpreted,” but also such systemic consequences as what the decision will do to the ability of the legislature to legislate effectively. For while in the pragmatic approach the court is trying to do the best it can rather than to carry out the will of the legislature as such, it will naturally be concerned with the consequences of failing to carry out that will when it can be discerned. Indeed, I would place this concern at the center of

responsible pragmatic interpretation, with the result that in easy cases pragmatic interpretation will yield the same outcome as the traditional methods. It will be the rare case where the gains in substantive justice from ignoring or denying the will of the legislature will exceed the loss in impairing interbranch relations and injecting uncertainty into the legislative process. Pragmatic concern with case-specific consequences will therefore be confined largely to those cases where mentalist or purposive interpretation fails.

The pragmatic approach is comfortable not only with the checklist-of-relevant-considerations concepts of the canons, and with the mentalist and purposive modes of interpretation where they can be applied, but also with Hamilton's conception of the buffering role of the courts and with what I have called the domesticated version of the interest-group theory. It is interested in a practical comparison of the functional capabilities of courts and legislatures, and therefore takes account of the fact that the courts have greater detachment from partisan concerns, and a longer time horizon, than legislators have, as well as the benefit of the experience that has accumulated since enactment of the statutes in question, while legislatures have more flexible powers as well as democratic legitimacy and—what may well be the same thing—"ear to ground" information (the legislature is closer to the grass roots; the judiciary is a mandarin). The pragmatic approach is uncomfortable with monistic or overarching theories of interpretation, whether politically or epistemologically grounded. It adjures the judge to do the best that he can, attentive to the implications of modern theories about the judicial process such as the interest-group theory, but committed to none and not overly self-conscious in performing the "interpretive" task.

The pragmatic approach is vulnerable to criticism as being vague, unsystematic, a cop-out, unprofessional. Yet it may well be the best approach consistent with what we know about the relevant variables. It is I believe the actual approach taken by the best judges, and it is thus an attainable ideal.

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